



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

August 29, 2011

Ms. Donna L. Johnson
Olson & Olson L.L.P.
Wortham Tower, Suite 600
2727 Allen Parkway
Houston, Texas 77019

OR2011-12488

Dear Ms. Johnson:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 428136.

The City of Clear Lake Shores (the "city"), which you represent, received a request for twelve categories of information pertaining to the city's evidence locker, the staff person at the Galveston County district attorney's office who received a specified telephone call, city policies regarding cash advances on salary and any personnel who have used this policy, and information pertaining to the city administrator. You state you have released some of the requested information. You state some of the submitted information is not subject to the Act. You claim portions of the submitted information are excepted from disclosure under sections 552.101, 552.104, 552.107, 552.108, 552.111, and 552.139 of the Government Code.¹ We have considered the exceptions you claim and reviewed the submitted information. We have also received and considered comments from the requestor. *See* Gov't Code § 552.304 (interested party may submit comments stating why information should or should not be released).

Initially, we note the city did not submit for our review information responsive to items 1-2, the second 3, and 4-8 of the request.² The requestor states information responsive to item 8 of the request has been released. Although you state the city submitted a representative sample of information, no portion of the submitted representative sample pertains to the remaining items listed above. Thus, we find the submitted information is not representative of the information sought in items 1-2, the second 3, and 4-7 of the request. Please be advised this open records letter applies to only the types of information you have submitted

¹Although you also raise the attorney-client privilege under rule 503 of the Texas Rules of Evidence, we note section 552.107 is the proper exception to raise for your attorney-client privilege claim in this instance.

²We note that the request for information had two items of requested information listed as number 3.

for our review. Therefore, this ruling does not authorize the withholding of any other requested records to the extent those records contain substantially different types of information than that submitted to this office. *See id.* § 552.302 (where request for attorney general decision does not comply with requirements of section 552.301 of the Government Code, information at issue is presumed to be public). Because you have not submitted information responsive to items 1-2, the second 3, and 4-7 of the request for our review, we assume the city has released any such information. *See id.* §§ 552.301, .302. If the city has not released such information, it must do so at this time. *See* Open Records Decision No. 664 (2000) (if governmental body concludes that no exceptions apply to requested information, it must release information as soon as possible).

Next, we address your assertion Exhibit 2 and the password and user name information in Exhibit 3 are not subject to the Act. The Act is applicable only to “public information.” *See* Gov’t Code § 552.021. Section 552.002 of the Act defines public information as information that is collected, assembled, or maintained under a law or ordinance or in connection with the transaction of official business:

(1) by a governmental body; or

(2) for a governmental body and the governmental body owns the information or has a right of access to it.

Id. § 552.002. Thus, virtually all of the information in a governmental body’s physical possession constitutes public information and thus is subject to the Act. *Id.* § 552.002(a)(1); *see* Open Records Decision Nos. 549 at 4 (1990), 514 at 1-2 (1988). The Act also encompasses information that a governmental body does not physically possess, if the information is collected, assembled, or maintained for the governmental body, and the governmental body owns the information or has a right of access to it. Gov’t Code § 552.002(a)(2); *see* Open Records Decision No. 462 at 4 (1987). You contend Exhibit 2 consists of e-mails that “are strictly private and contain no information related to city business[.]” You further state the e-mails contained within Exhibit 2 “were simply an incidental use of email by a city employee and pertain only to personal matters.” Based on your representation and our review of the information at issue, we conclude Exhibit 2 does not constitute public information for the purposes of section 552.002. *See* Open Records Decision No. 635 at 4 (1995) (section 552.002 not applicable to personal information unrelated to official business and created or maintained by state employee involving *de minimis* use of state resources). Therefore, Exhibit 2 is not subject to the Act and need not be released in response to this request. You also assert the user name and password information in Exhibit 3 is not public information subject to the Act. This office has determined that certain computer information, such as source codes, documentation information, and other computer programming that has no significance other than its use as a tool for the maintenance, manipulation, or protection of public property is not the kind of information made public under section 552.021 of the Government Code. *See* Open Records Decision No. 581 (1990). Based on the reasoning in that decision and our review of the information at issue, we determine that the user name and password information in Exhibit 3, which we have marked, does not constitute public information under section 552.002.

Accordingly, the marked user name and password information in Exhibit 3 is also not subject to the Act and need not be disclosed.³

We next address the requestor's assertion that the city failed to comply with its ten-business-day deadline under section 552.301(b) of the Government Code and its fifteen-business-day deadline under section 552.301(e) in requesting this decision. *See* Gov't Code § 552.301(a)-(b), (e). Section 552.301 describes the procedural obligations placed on a governmental body that receives a written request for information it wishes to withhold. Pursuant to section 552.301(b), the governmental body must ask for the attorney general's decision and state the exceptions that apply within ten business days after receiving the request. *See id.* § 552.301(b). Section 552.301(e) provides the governmental body must submit to this office, not later than the fifteenth business day after the date of its receipt of the request, (1) written comments stating why the governmental body's claimed exceptions apply to the information it seeks to withhold; (2) a copy of the written request for information; (3) a signed statement of the date on which the governmental body received the request or evidence sufficient to establish that date; and (4) the specific information the governmental body seeks to withhold or representative samples if the information is voluminous. *See id.* § 552.301(e)(1)(A)-(D). The city received the request on June 16, 2011. The city informs us that city offices were closed July 4, 2011. This office does not count any holidays as business days for the purposes of calculating a governmental body's deadline under the Act. The requestor asserts that June 18, 2011, a Saturday, should be considered a business day for purposes of section 552.301(b) because certain city officials were working in the city offices on that date. However, we note the city's website reflects that the city's administrative officers are open for business Monday through Friday of a given week.⁴ Thus, even if some officials were working in city offices on Saturday, June 18, we do not find that this date should thereby be counted as a business day for the purpose of calculating the city's deadlines under the Act. Thus, the city's ten-business-day deadline was June 30, 2011 and its fifteen-business-day deadline was July 8, 2011. The city's ten-day brief was postmarked June 24, 2011 and its fifteen-day brief, which contained the submitted information, was postmarked July 8, 2011. *See id.* § 552.308 (describing rules for calculating submission dates of documents sent via first class United States mail, common or contract carrier, or interagency mail). Accordingly, we find the city complied with section 552.301 of the Government Code.

Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." *Id.* § 552.101. The city raises section 552.101 in conjunction with provisions of the Texas Homeland Security Act (the "HSA"), chapter 418 of the Government Code. Sections 418.176 and 418.182 were added to chapter 418 as part of the HSA. These provisions make certain information related to terrorism confidential. Section 418.176 provides in relevant part:

³As our ruling is dispositive for this information, we need not address your remaining argument.

⁴*See* http://www.clearlakeshores-tx.gov/index.asp?Type=B_LIST&SEC={FF59DF58-C40D-409F-8C4E-64C633189597};#{0E136711-AC70-45E1-A0A5-48A7BEB7F0AE}.

(a) Information is confidential if the information is collected, assembled, or maintained by or for a governmental entity for the purpose of preventing, detecting, responding to, or investigating an act of terrorism or related criminal activity and:

(1) relates to staffing requirements of an emergency response provider, including a law enforcement agency, a fire-fighting agency, or an emergency services agency;

(2) relates to a tactical plan of the provider; or

(3) consists of a list or compilation of pager or telephone numbers, including mobile and cellular telephone numbers, of the provider.

Id. § 418.176(a). Section 418.182 provides, in relevant part:

(a) Except as provided by Subsections (b) and (c), information . . . in the possession of a governmental entity that relates to the specifications, operating procedures, or location of a security system used to protect public or private property from an act of terrorism or related criminal activity is confidential.

(b) Financial information in the possession of a governmental body that relates to the expenditure of funds by a governmental entity for a security system is public information that is not excepted from required public disclosure under [the Act].

Id. § 418.182(a)-(b). The fact that information may be related to a governmental body's security concerns does not make such information *per se* confidential under the HSA. *See* Open Records Decision No. 649 at 3 (1996) (language of confidentiality provision controls scope of its protection). Furthermore, the mere recitation of a statute's key terms is not sufficient to demonstrate the applicability of a claimed provision. As with any exception to disclosure, an entity asserting one of the confidentiality provisions of the HSA must adequately explain how the responsive records fall within the scope of the claimed provision. *See* Gov't Code § 552.301(e)(1)(A) (governmental body must explain how claimed exception to disclosure applies).

You state Exhibit 4 relates to (1) tactical plans of emergency response providers that were collected, assembled, or maintained by the city for the purpose of preventing, detecting, responding to or investigating an act of terrorism or related criminal activity or (2) the specifications, operating procedures, or location of a security system used to protect public or private property from an act of terrorism or related criminal activity. Upon review, we agree Exhibit 4 relates to tactical plans of emergency response providers that were collected, assembled, or maintained by the city for the purpose of preventing, detecting, responding to or investigating an act of terrorism or related criminal activity. Accordingly, the city must

withhold Exhibit 4 under section 552.101 in conjunction with section 418.176 of the Government Code.

You claim the e-mails in Exhibit 6 are excepted from disclosure under section 552.104 of the Government Code. Section 552.104 excepts from disclosure “information that, if released, would give advantage to a competitor or bidder.” *Id.* § 552.104. The purpose of section 552.104 is to protect a governmental body’s interests in competitive bidding situations, including where the governmental body may wish to withhold information in order to obtain more favorable offers. *See* Open Records Decision No. 592 at 8 (1991) (statutory predecessor to section 552.104 designed to protect interests of governmental body). Section 552.104 requires a showing of some actual or specific harm in a particular competitive situation; a general allegation that a competitor will gain an unfair advantage will not suffice. Open Records Decision No. 541 at 4 (1990). Section 552.104 does not except information relating to competitive bidding situations once a contract has been awarded. Open Records Decision Nos. 306 (1982), 184 (1978) (section 552.104 no longer applicable when bidding had been completed and contract is in effect). You state the submitted e-mails contain information on bid proposals submitted to the city. However, you have not provided specific arguments explaining how releasing these e-mails will compromise this bidding process. Therefore, we conclude the city may not withhold Exhibit 6 under section 552.104 of the Government Code.

You raise section 552.107(1) of the Government Code for Exhibit 5. Section 552.107(1) protects information coming within the attorney-client privilege. When asserting the attorney-client privilege, a governmental body has the burden of providing the necessary facts to demonstrate the elements of the privilege in order to withhold the information at issue. *See* Open Records Decision No. 676 at 6-7 (2002). First, a governmental body must demonstrate that the information constitutes or documents a communication. *Id.* at 7. Second, the communication must have been made “for the purpose of facilitating the rendition of professional legal services” to the client governmental body. TEX. R. EVID. 503(b)(1). The privilege does not apply when an attorney or representative is involved in some capacity other than that of providing or facilitating professional legal services to the client governmental body. *In re Tex. Farmers Ins. Exch.*, 990 S.W.2d 337, 340 (Tex. App.—Texarkana 1999, orig. proceeding) (attorney-client privilege does not apply if attorney acting in a capacity other than that of attorney). Third, the privilege applies only to communications between or among clients, client representatives, lawyers, and lawyer representatives. TEX. R. EVID. 503(b)(1). Thus, a governmental body must inform this office of the identities and capacities of the individuals to whom each communication at issue has been made. Lastly, the attorney-client privilege applies only to a confidential communication, *id.*, meaning it was “not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication.” *Id.* 503(a)(5). Whether a communication meets this definition depends on the intent of the parties involved at the time the information was communicated. *Osborne v. Johnson*, 954 S.W.2d 180, 184 (Tex. App.—Waco 1997, orig. proceeding). Moreover, because the client may elect to waive the privilege at any time, a governmental body must explain that the confidentiality of a communication has been maintained. Section 552.107(1)

generally excepts an entire communication that is demonstrated to be protected by the attorney-client privilege unless otherwise waived by the governmental body. *See Huie v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996) (privilege extends to entire communication, including facts contained therein).

We understand you to assert the e-mails submitted as Exhibit 5 constitute communications between legal counsel for the city and city officials. Furthermore, you state these e-mails were made under the attorney-client privilege. Based on your representations and our review, we find the city may withhold most of the information contained within Exhibit 5 under section 552.107(1) of the Government Code.⁵ However, we note some of the individual e-mails in Exhibit 5 consist of communications with parties you have not identified. *See* ORD 676. Because you have not explained how these parties are privileged with respect to the e-mails at issue, these e-mails may not be withheld under section 552.107(1).

Next, you claim that the cellular telephone numbers you have marked in Exhibit 7 are excepted from disclosure under section 552.108(b)(1) of the Government Code.⁶ Section 552.108(b)(1) excepts from required public disclosure an internal record of a law enforcement agency maintained for internal use in matters relating to law enforcement or prosecution if “release of the internal record or notation would interfere with law enforcement or prosecution[.]” Gov’t Code § 552.108(b)(1). A governmental body that seeks to withhold information under section 552.108(b)(1) must sufficiently explain how and why the release of the information would interfere with law enforcement and crime prevention. *See id.* § 552.301(e)(1)(A); *City of Fort Worth v. Cornyn*, 86 S.W.3d 320, 327 (Tex. App.—Austin 2002, no pet.) (section 552.108(b)(1) protects information that, if released, would permit private citizens to anticipate weaknesses in police department, avoid detection, jeopardize officer safety, and generally undermine police efforts to effectuate state laws); Open Records Decision Nos. 562 at 10 (1990), 531 at 2 (1989). In Open Records Decision No. 506 (1988), this office determined that the statutory predecessor to section 552.108(b) excepted from disclosure “cellular mobile phone numbers assigned to county officials and employees with specific law enforcement responsibilities.” ORD 506 at 2. We noted that the purpose of the cellular telephones was to ensure immediate access to individuals with specific law enforcement responsibilities and that public access to these numbers could interfere with that purpose. *Id.*

You inform us that the cellular telephone numbers you have marked are related to the internal records of a law enforcement agency. You assert that the release of these cellular telephone numbers “could compromise an investigation or reveal a pattern of police practices that could allow a criminal to avoid detection of a crime or aid in more effective commission of future crimes.” However, we note some of the cellular telephone numbers you have

⁵As our ruling is dispositive, we need not address your remaining argument for this information.

⁶Although you cite to section 552.108(a)(1) of the Government Code in your brief, the statutory language you quote and the substance of your arguments indicate you are asserting a claim under section 552.108(b)(1) of the Government Code.

highlighted do not belong to law enforcement officers. Accordingly, we must rule conditionally. To the extent the cellular telephone numbers you have highlighted in Exhibit 7 belong to law enforcement officers, they may be withheld under section 552.108(b)(1) of the Government Code. If the highlighted cellular telephone numbers do not belong to law enforcement officers, they may not be withheld under section 552.108(b)(1)

You raise section 552.111 of the Government Code for Exhibit 8 and the remaining information in Exhibit 5. Section 552.111 excepts from disclosure “an interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency.” Gov’t Code § 552.111. This exception encompasses the deliberative process privilege. *See* Open Records Decision No. 615 at 2 (1993). The purpose of section 552.111 is to protect advice, opinion, and recommendation in the decisional process and to encourage open and frank discussion in the deliberative process. *See Austin v. City of San Antonio*, 630 S.W.2d 391, 394 (Tex. App.—San Antonio 1982, no writ); Open Records Decision No. 538 at 1-2 (1990). In Open Records Decision No. 615, this office re-examined the statutory predecessor to section 552.111 in light of the decision in *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408 (Tex. App.—Austin 1992, no writ). We determined section 552.111 excepts from disclosure only those internal communications that consist of advice, recommendations, opinions, and other material reflecting the policymaking processes of the governmental body. *See* ORD 615 at 5. A governmental body’s policymaking functions do not encompass routine internal administrative or personnel matters, and disclosure of information about such matters will not inhibit free discussion of policy issues among agency personnel. *Id.*; *see also City of Garland v. Dallas Morning News*, 22 S.W.3d 351 (Tex. 2000) (section 552.111 not applicable to personnel-related communications that did not involve policymaking). A governmental body’s policymaking functions do include administrative and personnel matters of broad scope that affect the governmental body’s policy mission. *See* Open Records Decision No. 631 at 3 (1995).

Further, section 552.111 does not protect facts and written observations of facts and events that are severable from advice, opinions, and recommendations. *See* ORD 615 at 5. But if factual information is so inextricably intertwined with material involving advice, opinion, or recommendation as to make severance of the factual data impractical, the factual information also may be withheld under section 552.111. *See* Open Records Decision No. 313 at 3 (1982).

Section 552.111 can also encompass communications between a governmental body and a third-party consultant. *See* Open Records Decision Nos. 631 at 2 (section 552.111 encompasses information created for governmental body by outside consultant acting at governmental body’s request and performing task that is within governmental body’s authority), 561 at 9 (1990) (section 552.111 encompasses communications with party with which governmental body has privity of interest or common deliberative process), 462 at 14 (1987) (section 552.111 applies to memoranda prepared by governmental body’s consultants). For section 552.111 to apply, the governmental body must identify the third party and explain the nature of its relationship with the governmental body. Section 552.111

is not applicable to a communication between the governmental body and a third party unless the governmental body establishes it has a privity of interest or common deliberative process with the third party. *See* ORD 561 at 9.

You assert Exhibit 8 and the remaining information in Exhibit 5 consist of interagency and intraagency communications involving the discussion of policy issues of the city. However, we find the information at issue consists either of general administrative or personnel information that does not relate to policymaking or information that is purely factual in nature. Further, we find portions of the remaining information were communicated with individuals with whom you have failed to demonstrate how the city shares a privity of interest or common deliberative process. Accordingly, you have failed to demonstrate the applicability of section 552.111 to the information at issue, and none of it may not be withheld on that basis.

We note you seek to withhold portions of the submitted information under section 552.136 of the Government Code pursuant to the previous determination issued in Open Records Decision No. 684 (2009). Open Records Decision No. 684 authorizes all governmental bodies to withhold ten categories of information, including a bank checking account and routing number, under section 552.136 of the Government Code without the necessity of requesting an attorney general decision. Accordingly, the city may redact the bank checking account and routing number you have marked pursuant to Open Records Decision No. 684. However, we note the cellular telephone account numbers you have marked are not subject to our previous determination and may not be redacted without requesting an attorney general decision. Section 552.136 of the Government Code states that “[n]otwithstanding any other provision of this chapter, a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential.” Gov’t Code § 552.136. We find the city must withhold the cellular telephone account numbers you have marked under section 552.136 of the Government Code.

We note Exhibit 8 contains an e-mail address subject to section 552.137 of the Government Code.⁷ Section 552.137 of the Government Code excepts from disclosure “an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body,” unless the member of the public consents to its release or the e-mail address is of a type specifically excluded by subsection (c). *See id.* § 552.137(a)-(c). The e-mail address we have marked is not of a type specifically excluded by section 552.137(c). Accordingly, the city must withhold the e-mail address we have marked under section 552.137, unless its owner has affirmatively consented to disclosure.⁸

⁷The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

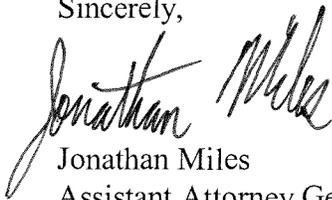
⁸We note ORD 684 is a previous determination to all governmental bodies authorizing them to withhold ten categories of information, including an e-mail address of a member of the public under section 552.137 of the Government Code, without the necessity of requesting an attorney general decision.

In summary, Exhibit 2 in its entirety and the password information in Exhibit 3, which we have marked, are not subject to the Act and need not be released in response to this request. The city must withhold Exhibit 4 under section 552.101 in conjunction with section 418.176 of the Government Code. The city may withhold Exhibit 5 under section 552.107(1) of the Government Code, except for the non-privileged e-mails we have marked for release. To the extent the cellular telephone numbers you have marked in Exhibit 7 belong to law enforcement officers, the city may withhold the cellular telephone numbers under section 552.108(b)(1) of the Government Code. The city must withhold the cellular telephone account numbers you have marked under section 552.136 of the Government Code. The city must withhold the e-mail address we have marked in Exhibit 8 under section 552.137 of the Government Code, unless its owner has affirmatively consented to disclosure. The remaining information must be released.

This letter ruling is limited to the particular information at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other information or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and responsibilities, please visit our website at http://www.oag.state.tx.us/open/index_orl.php, or call the Office of the Attorney General's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Act must be directed to the Cost Rules Administrator of the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,



Jonathan Miles
Assistant Attorney General
Open Records Division

JM/em

Ref: ID# 428136

Enc. Submitted documents

c: Requestor
(w/o enclosures)